87-457

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CASE NO.

# in the Supreme Court of the United States

OCTOBER TERM, 1986

JAMES DUNSTER and JEAN DUNSTER, individually and as personal representatives of the Estate of James Dunster, Jr.,

*Petitioners,*

*vs.*

METROPOLITAN DADE COUNTY and PETER AYDELOTTE,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals for the Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Where a person is negligently shot and killed by the police and a jury finds that a county policy both falls below acceptable standards of police procedure and is a proximate cause of the death, can the county be liable under 42 U.S.C. §1983 even though the individual policeman is not liable for the negligent shooting?

2. When a controlling legal principle changes between the trial and the decision on appeal, and this causes a reversal of a money damage judgment based on a jury verdict, on remand to the district court is the plaintiff entitled to a new trial where he is given an opportunity to present evidence to meet the new legal principle?

3. Can a court of appeals reverse a judgment on an issue that is not raised in the appellant's brief, not raised at oral argument and for which relevant portions of the trial proceedings have not been transcribed or presented to the court of appeals?

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*Petitioners,*

*vs.*

METROPOLITAN DADE COUNTY and PETER AYDELOTTE,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals for the Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, James Dunster and Jean Dunster, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on June 24, 1986.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 791 F.2d 1516 and is reprinted in the appendix hereto at A-1. The judgment of the United States District Court for the Southern District of Florida (Hoeveler, J.) has not been reported. It is reprinted in the appendix hereto at A-8.

## JURISDICTION

The judgmen . of the Court of Appeals was entered on June 24, 1986. Rehearing was denied on June 16, 1987. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## STATUTE INVOLVED

42 U.S.C. §1983. Every person who, under color of statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

Petitioners, the mother and father of James Dunster, Jr., filed a complaint against respondents to recover for the shooting death of their son (Second Amended Complaint pp. 4-5). Jurisdiction of the district court was invoked under 28 U.S.C. §§1331 and 1343. Paragraph one (1) of the complaint says that it is brought, among other things, pursuant to the Fourth and Fourteenth Amendments to the United States Constitution.

Respondent Aydelotte was a Metropolitan Dade County police officer (Second Amended Complaint pp. 3-4). Count I of the complaint alleged that Aydelotte negligently shot and killed James Dunster, Jr. and deprived him of the following rights:

> A. The right and privilege not to be deprived of life and liberty without due process of law;
>
> B. The right and privilege to be free from unlawful attacks upon the physical integrity of their person;
>
> C. The right and privilege not to be subjected to punishment without due process of law;
>
> D. The right and privilege to be free from arbitrary intrusion by the police;

(Second Amended Complaint p. 6). Count II of the complaint alleged that the county failed to properly train, supervise, discipline and control its police officers with regard to the drinking of alcoholic beverages off duty and use of weapons off duty (Second Amended Complaint p. 8).

The pretrial stipulation signed by both sides says that the case is brought, among other things, pursuant to the Fourth and Fourteenth Amendments (Pretrial Stipulation p. 1) The agreed issues which remained to be litigated included whether James Dunster, Jr. was deprived of his rights "to be free from unlawful attack . . . and to be free from arbitrary intrusions by the police." (Pretrial Stipulation p. 3). The petitioners' pretrial memorandum of law asserts a cause of action based on the Fourth Amendment (Pretrial Memorandum of Law p. 4).

Metropolitan Dade County police officers are required to carry their weapons while off duty (Testimony of Ralph Walker, executive officer in charge of the police department's internal review section). It is left to the discretion of the police officer to decide when he is so impaired by alcohol that he should not use his weapon. (Testimony of William Smith, assistant director of the police department). Officers are also given discretion on whether to use their weapons in a single action (cocked) or double action (non-cocked) mode (Testimony of E. Wilson Purdy, director of the county police department in 1979).

Aydelotte was off duty and had previously consumed several alcoholic beverages at other bars before arriving at Morey's bar on the night of April 26, 1979 (A-4). Aydelotte testified that he was attacked by the deceased's brother and a friend, that he cocked his pistol and announced that he was a police officer (A-4). He further testified that he was knocked backwards and fell to the ground, at which time his gun discharged, striking and killing James Dunster, Jr. (A-4). This

version of events was contradicted by both the deceased's brother and the friend, who testified that there was no altercation and that they were in the restroom at the time of the shooting (A-4). A third, unrelated witness stated that she did not notice anything unusual at the bar until she heard the gunshot (A-4). Aydelotte's version of events was further contradicted by the testimony of the deputy chief medical examiner. He testified that gunpowder marks on the victim's chest showed that the gun was fired from 4 to 6 inches away, that the path of the bullet inside the victim was *downward* by approximately nine inches and that the bullet's pathway was inconsistent with a person on his back, holding a gun pointed upward and shooting someone above him (Testimony of Charles Wetli).

The former deputy chief of the Los Angeles Police Department testified that cocking a weapon is going to precipitate accidental shootings, that it is reckless to cock a weapon in a crowded bar, that there was no justification for the use of deadly force when Aydelotte drew his weapon and that Aydelotte fell below acceptable police standards in failing to pull out a badge or identification card when wearing Levis, a plaid shirt and cowboy boots in a crowded, noisy bar (Testimony of Louis Reiter). A professor of criminology at Florida State University testified that there is never any reason to cock a weapon, that it is an extremely dangerous and reckless thing to do and that Aydelotte should not have drawn his weapon without taking out his police identification at the same time (Testimony of George Kirkham).

The portion of the jury charge conference that concerned the rights of the deceased was not reported by the court reporter. In its charge to the jury the court tracked the language on those Fourth Amendment rights set out in the Second Amended Complaint as quoted above.

The respondents sought a jury instruction, based on §776.05 Fla. Stat. (1981), that a policeman need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistence to an arrest and is justified in the use of force necessary to defend himself while making the arrest. The district court agreed to give this instruction. Opposing the instruction, petitioners argued that James Dunster, Jr. could not have been resisting or threatening resistance, because he had no knowledge that an arrest was being attempted and was shot by Aydelotte before anyone tried to arrest him or told him that he was under arrest. In this context, counsel for the petitioners said that there was no arrest to resist.

The jury found that Aydelotte was negligent and that this negligence caused Dunster's death (A-10). It found that the county's policy relating to off duty officers carrying their weapons at all times and the policy of allowing the officers complete discretion in cocking their firearms both fell below acceptable standards of police procedure (A-11), and that the policy of allowing discretion in cocking firearms was a proximate cause of Dunster's death. The jury also found Dunster to have comparative negligence of 25%. Based on the verdict, the court entered a judgment of $175,125.00 for the Estate of James Dunster, Jr. and $37,500.00 for each of his parents (A-8, 9).

On appeal the respondents raised four (4) issues:

> I. Whether the actions of the defendant police officer constituted a constitutional tort.
>
> II. Whether plaintiffs are precluded from maintaining an action pursuant to 42 U.S.C. §1983, because an adequate post deprivation remedy is provided by state law and no substantive due process or Fourth Amendment claim is presented.
>
> III. Whether the defendant police officer was entitled to submit a good faith defense to the jury.
>
> IV. Whether the defendant county can be held liable where there was no allegation or proof of a policy which was itself unconstitutional, nor any allegation or proof of gross negligence in the training of police officers.

(Brief of Appellants in United States Court of Appeals for the Eleventh Circuit p. 4).

The court of appeals reversed the judgment of the district court and remanded for entry of a judgment in favor of the defendants (A-7). The court held that the petitioners had waived their Fourth Amendment claim, because with the exception of the pretrial pleadings, it was unable to find reference to the Fourth Amendment during argument to the court or the jury (A-6) and cited to petitioners' argument against respondents' jury instruction on resisting arrest and the use of force, saying:

"In fact, the plaintiffs represented to the district court that there was no unlawful arrest situation present in this case." (A-6). It further held that negligent conduct cannot give rise to a Fourteenth Amendment claim against a police officer or a county (A-5).

## REASONS FOR GRANTING WRIT

### I.

### THE JUDGMENT AGAINST METROPOLITAN DADE COUNTY SHOULD STAND

The court of appeals holding that Metropolitan Dade County could not be held liable on the petitioners' Fourteenth Amendment claim was based on *Daniels v. Williams*, ____ U.S. ____, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986) and *Davidson v. Cannon*, ____ U.S. ____, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986). Neither of these cases concerns nor discusses standards for local government liability. Each concerns the liability of individual officials.

The decision below is contrary to the language and spirit of *Owen v. City of Independence*, 445 U.S. 622 (1980). The *Owen* opinion, 445 U.S. at 642, quotes from the debates in the forty-second Congress to show that municipal corporations were to be liable for injuries caused by a neglect of corporate duty, as that was the prevailing law in 1871. The natural implication of the word "neglect" is that a municipality should be responsible for negligent acts. Footnote 23 of the *Owen* opinion quotes Senator Stephenson for the proposition that in 1871 municipal corporations were liable for acts

done in pursuance of a general authority to act for the corporation on the subject to which they relate. No distinction was drawn between liability for negligent versus intentional acts of the municipality's agents.

It is clear from the *Owen* opinion that a different standard of liability applies to local governments than applies to individuals. In its summation the court said: "No longer is individual 'blameworthiness' the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct." *Owen*, 445 U.S. at 657. It concludes by saying: "The public will be forced to bear only the costs of injury inflicted by the 'execution of a government's policy or custom . . . .' " *Id.* at 657.

In the present case the jury found that a policy of Metropolitan Dade County was a proximate cause of the death of James Dunster, Jr. In order to harmonize the opinion of the U.S. Court of Appeals for the Eleventh Circuit with the opinion of this Court in *Owen v. City of Independence*, jurisdiction should be accepted to determine if a local government will be held liable when it establishes a policy, a policeman in following the policy negligently causes the death of a citizen and the fact-finder determines that the policy fell below acceptable police standards and was a proximate cause of the death.

The question raised has importance beyond the facts of this case. By nature of the issue, this is a question that will recur in many other cases. History has shown that almost inevitably encounters between police and

the citizenry have led to personal injuries, including deaths, and ensuing litigation under 42 U.S.C. §1983.

The decision of the court of appeals below conflicts with *Kibbe v. City of Springfield*, 777 F.2d 801 (1st Cir. 1985). *Kibbe* involved an action brought under 42 U.S.C. §1983 to recover for a wrongful shooting and killing by a police officer. The claim against the municipality was based on inadequate training of police officers in the use of firearms. The jury was instructed, in part, that: "A government body can be found responsible for the deprivation of a person's civil rights if the actions taken by its employees are in accordance with a custom or practice of the government and those actions caused the deprivation of the person's rights." *Id.* at 809-810. The jury returned a verdict against the municipality and that verdict was affirmed on appeal.

The rights of an individual to recover against a local government for the violation of his federally protected civil rights should not depend on the circuit in which he is injured. In order to eliminate conflict among the circuits on an issue of federal law and to promote uniformity throughout the country for the protection of basic federal civil rights, the court should accept jurisdiction of this case.

## II.

## REMAND SHOULD HAVE ALLOWED FOR A NEW JURY TRIAL

At the time the case was tried, the controlling law was that negligent conduct by state officials did give rise to a valid Fourteenth Amendment claim. *Parratt v. Taylor*, 451 U.S. 527, 536-537 (1981). Final judgment was entered by the district court on January 8, 1985. The *Daniels* and *Davidson* cases were not decided until January 21, 1986, over a year later. Based on these decisions, the court of appeals held that judgment must be entered in favor of both Aydelotte and Metropolitan Dade County.

The decision to remand without the opportunity for a new trial conflicts with *Liss v. School District of City of Ladue*, 548 F.2d 751 (8th Cir. 1977); *Uzzell v. Friday*, F.2d 1117 (4th Cir. 1980); and *Women's Health Services, Inc. v. Maher*, 636 F.2d 23 (2d Cir. 1980). In *Liss*, a female employee who gave birth challenged a school district's sick leave program, that excluded disability caused by child birth, on the ground that it violated Title VII of the Civil Rights Act of 1964. The district court awarded her 22 days back pay, but while the case was pending on appeal this Court issued its opinion in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). The *Gilbert* opinion held that the exclusion of pregnancy from a disability benefit plan was not of itself gender based discrimination, but left open the possibility of recovery in a case where a facially neutral distinction is a pretext for gender based discrimination. Instead of simply reversing the district court, the court of appeals

in *Liss* remanded for reconsideration in light of *Gilbert* with instructions that the plaintiff be allowed to present additional evidence and argument as to whether the school district's policy was in fact discriminatory.

In *Daniels v. Williams*, 106 S.Ct. at 666-67, 88 L.Ed.2d at 670, this Court left open the question as to whether recklessness or gross negligence is sufficient to establish a deprivation of substantive due process of law in a claim against an individual official. Given the nature of the evidence in this case, in particular the alcoholic consumption by Aydelotte prior to the shooting, the gunpowder marks on Dunster's chest and the trajectory of the bullet, which imply an execution type killing, and the contradiction of Aydelotte's testimony by other witnesses, a ruling in harmony with the Eight Circuit's decision in *Liss* would have remanded with instructions for a new trial where the petitioners would be allowed to show that Aydelotte was reckless or grossly negligent.

*Uzzell v. Friday, supra*, involved University of North Carolina rules that established racial and gender quotas for the school's Campus Governing Council and Student Honor Code Board. While the case was pending on appeal, *University of California v. Bakke*, 438 U.S. 265 (1978), was decided. The Fourth Circuit did not merely reverse the district court decision allowing the quotas, but remanded "for the development of a full record and for findings of fact and conclusions of law in light of *Bakke* . . . ." *Uzzell*, 625 F.2d at 1121.

The district court that heard *Women's Health Services, Inc. v. Maher*, *supra*, had declared unconstitutional a Connecticut regulation that limited funding for abortions to instances where the mother's life was in danger. While the case was pending on appeal, *Harris v. McCrae*, 448 U.S. 297 (1980), and *Williams v. Zbaraz*, 448 U.S. 358 (1980), were decided. Even though the Second Circuit strongly doubted that the case could be meaningfully distinguished from *McCrae* and *Zbaraz*, it remanded to the district court to hear argument in light of the new precedents.

## III.

## PETITIONERS DID NOT ABANDON THEIR FOURTH AMENDMENT CLAIMS

The court of appeals below decided that the petitioners had abandoned their Fourth Amendment claims, because, with the exception of the pretrial pleadings, it was unable to find reference to the Fourth Amendment in argument presented to the court or the jury and because of the statement by the petitioners in opposition to the respondents requested jury instruction on resisting arrest and the use of force. The parties' pretrial stipulation expressly identifies the Fourth Amendment as one of the bases of the petitioners' claims and the petitioners' pretrial memorandum of law asserts a claim under the Fourth Amendment. The court instructed the jury on the Fourth Amendment rights asserted by the petitioners in their complaint. The jury instruction on resisting arrest and use of force was in fact given by the district court. If the district court had actually determined that there was no arrest, it would not have given this instruction.

The analysis below of the petitioners' argument that James Dunster, Jr. could not have been resisting arrest, because he was shot without any attempt to arrest him, runs counter to this Court's ruling in *Tennessee v. Garner*, 471 U.S. 1 (1985). There, the Court held that a shooting and killing of a person by the police is of itself a seizure under the Fourth Amendment. *Id* at 7. The court of appeals below confused arrest under Florida law with seizure under the Fourth Amendment to the U.S. Constitution.

In the present case the portion of the jury charge conference that discussed the bases for the petitioners' claims was not transcribed. Fed. R. App. P. 10(c) places the burden on an appellant to prepare a statement of proceedings if a transcript is unavailable. The respondents, as appellants below, chose not to prepare a report of the portion of the jury instruction conference that concerned the bases for the petitioners' claims. It is a far departure from the accepted and usual course of judicial proceedings to rule on an issue when a transcript or record of proceedings is not available and to punish an appellee for an appellant's failure to prepare such a record. 16 C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure:* Jurisdiction and Related Matters §3956 (1987 Supp.).

In the pretrial stipulation the parties agreed that the petitioners were bringing their action under the Fourth Amendment. The accepted and usual course of judicial proceedings is that the parties are bound by what they say in a pretrial stipulation concerning the issues of the case. 3 J. Moore, *Moore's Federal Practice* ¶16.11 (2d ed. 1985). For the court of appeals to ignore

the pretrial stipulation is such a departure from the usual course of proceedings as to call for the exercise of this Court's power of supervision.

The district court's instruction to the jury tracked verbatim the portion of the petitioners' complaint that asserted their Fourth Amendment claims. The respondents made no objection to this instruction. The general and long established rule is that a federal appellate court will not consider an issue that was not raised in the district court. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). The assertion that the petitioners had waived their Fourth Amendment claim was not raised in the respondents' briefs to the court of appeals or orally argued to that court. The usual and accepted standard of federal appellate practice is that a contention not raised by an appellant in his briefs to the court is considered waived. *Zuccarello v. Exxon Corp.*, 756 F.2d 402, 407-408, (5th Cir. 1985). For the court of appeals to raise this matter *sua sponte* in its opinion, without notice to the parties and without the opportunity to present either briefs or oral argument, is not only a major departure from accepted and usual practice, but also deprives the petitioners of the essential elements of due process of law: notice and an opportunity to be heard. As this court said in *Singleton v. Wulff*, 428 U.S. at 121, "injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard."

## CONCLUSION

Because the decision below conflicts with the decisions of other federal courts of appeals and of this Court on the same matter, and because the decision has so far departed from the accepted and usual course of judicial proceedings to call for an exercise of this Court's power of supervision, petitioners pray that the Court assume jurisdiction over the case.

Respectfully submitted,

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September 14, 1987

# Appendix

James DUNSTER, Jane Dunster, as the Personal Representatives of the Estate of James Dunster, Jr. and James Dunster, Individually,

*Plaintiffs-Appellees,*

*v.*

METROPOLITAN DADE COUNTY, a political subdivision of the State of Florida, and Peter Aydelotte,

*Defendants-Appellants.*

Detective Zatrepalek, et al.,

*Defendants.*

**No. 85-5573.**

United States Court of Appeals, Eleventh Circuit.

June 24, 1986.

Parents of decedent brought civil rights action, in their individual and representative capacities, against county and police officer, arising out of incident wherein off-duty police officer allegedly shot decedent at bar. Judgment was entered in the United States District Court for the Southern District of Florida, Wm. M. Hoeveler, J., upon jury verdict in favor of parents and against both defendants, and defendants appealed. The Court of Appeals, Henderson, Senior Circuit Judge, held that: (1) alleged negligence of county and off-duty police officer did not give rise to valid claim for violation of decedent's due process rights under Fourteenth Amendment, and (2) parents who abandoned Fourth

amendment unreasonable search and seizure claim at trial were not entitled to recover on such theory on appeal.

Reversed.

**1. Civil Rights —13.4(1)**

Alleged negligence of county and off-duty police officer, resulting in officer's shooting decedent at bar, did not give rise to valid claim for violation of decedent's due process rights under Fourteenth Amendment. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 14.

**2. Federal Civil Procedure —621**

Parents of decedent, who brought civil rights action, in their individual and representative capacities, against county and police officer, arising out of incident wherein decedent was shot at bar by off-duty police officer, abandoned Fourth Amendment unreasonable search and seizure claim, even though complaint mentioned Fourth Amendment, where case was presented to jury as one implicating only right to due process, parents represented to court that there was no unlawful arrest situation and parents never objected to court's failure to instruct jury on Fourth Amendment violation. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 4.

**3. Federal Courts —617**

Parents of decedent who brought civil rights action, in their individual and representative capacities, against county and police officer, arising out of incident

wherein decedent was shot by off-duty police officer at bar, were not entitled to recover on appeal on theory of Fourth Amentment violation, where parents abandoned Fourth Amendment claims during trial. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 4.

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Appeal from the United States District Court for the Southern District of Florida.

Before FAY, Circuit Judge, and HENDERSON* and NICHOLS**, Senior Circuit Judges.

HENDERSON, Senior Circuit Judge:

This lawsuit arises out of the death of James Dunster, Jr., who died as a result of gunshot wounds sustained on April 26, 1979. The plaintiffs/appellees in this 42 U.S.C. § 1983 action are the parents of James Dunster, who sued in their individual and representative capacities, and the defendants/appellants are Metropolitan Dade County (Dade) and police officer Peter Aydelotte. In the United States District Court for the Southern District of Florida, the jury returned a verdict in favor of the plaintiffs and against both defendants in the aggregate sum of $333,500.00.[1] The

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*See Rule 3(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Philip Nichols, Jr., Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

[1]The jury also found that James Dunster was comparatively negligent and the court reduced the damages by 25%.

defendants then filed a timely appeal of the judgment in favor of the plaintiffs entered by the the district court on January 8, 1985. After a careful review of the briefs, the record and the relevant case law, we conclude that the verdict and judgment must be reversed and the case remanded for the entry of a judgment in favor of the defendants.

Because of the nature of the legal issues presented, only a recitation of the facts pertinent to our review is necessary. The incident under investigation occurred at Morey's bar on April 26, 1979. Officer Aydelotte was off duty at the time and had previously consumed several alcoholic beverages at other bars before arriving at Morey's. The facts leading up to James Dunster's death are in dispute. Aydelotte claimed that a man named George Goodson, who was at the bar with Richard Dunster, the brother of the deceased, attacked him with a glass "out of the blue" and began an altercation. During the scuffle, Aydelotte cocked his pistol and announced that he was a police officer. At that point the deceased, James Dunster, who was not in Aydelotte's line of vision, allegedly jumped into Aydelotte and knocked him backwards. Aydelotte fell to the ground at which time the gun fired, fatally wounding James Dunster.

Aydelotte's version of the events was contradicted by Goodson and Richard Dunster who testified that there was no altercation and that they were inside the restroom at the time of the shooting. In addition, another person who was present in the bar, Danette DiRubio, stated that she did not notice anything unusual at the bar until she heard the gunshot. None

of the plaintiffs' witnesses, however, actually saw Aydelotte shoot Dunster and the plaintiffs offered no explanation of the events preceding the shooting.

The plaintiffs introduced evidence that Dade County had a policy which required its officers to carry their weapons while off duty including times when they were present in bars. The County also permitted police officers to determine the appropriate circumstances under which they should cock their guns. The plaintiffs presented expert testimony that both of these policies fell below normal police practices and that Aydelotte's conduct in the bar fell below acceptable police standards. The defendants offered evidence contradicting this expert testimony.

[2] In the district court, the plaintiffs contended that Officer Aydelotte and Dade County *negligently* violated the deceased's right to due process under the Fourteenth Amendment. The district court charged the jury on negligence and the special interrogatories submitted to the jury were based on negligence.[2] It is now clear, however, that negligent conduct of state officials can not give rise to a valid Fourteenth Amendment claim. *Daniels v. Williams*, ____ U.S. ____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Davidson v. Cannon*, ____ U.S. ____, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986). Because the plaintiffs' case was premised on a theory of negligence, the jury verdict cannot be sustained under the Fourteenth Amendment.

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[2]The plaintiffs conceded to the district court that their case was predicated on negligence. Record on Appeal, Vol. 10 at 94.

[2] The plaintiffs' sole argument before us in support of the jury verdict is that simple negligence is sufficient to authorize a Fourth Amendment unreasonable search and seizure claim. They argue that the shooting of James Dunster, Jr. violated his Fourth Amendment rights. Although the complaint mentions the Fourth Amendment, the case was presented to the jury as one implicating only the right to due process. The district court's jury instructions dealt only with the allegation that James Dunster was deprived of his life and liberty without due process of law; unreasonable search and seizures were nowhere mentioned in these instructions. In fact, the plaintiffs represented to the district court that there was no unlawful arrest situation present in this case. Record on Appeal, Vol. XI at 107. Moreover, the plaintiffs never objected to the court's failure to instruct the jury on a Fourth Amendment violation. Based on our review of the record, we conclude that the plaintiffs abandoned their Fourth Amendment claims.[3]

[3] In summary, this case was tried exclusively as a negligence action under the Due Process Clause of the Fourteenth Amendment. However, as pointed out earlier, mere negligence is insufficient to support an action for a Fourteenth Amendment due process violation. *See Daniels, supra.* The plaintiffs, having abandoned their Fourth Amendment claims during the

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[3]With the exception of the pretrial pleadings, we are unable to find even one reference to the Fourth Amendment by plaintiffs' counsel in any of the arguments presented to the district court or the jury. Because the plaintiffs did not pursue a Fourth Amendment cause of action, we need not decide whether James Dunster actually suffered any Fourth Amendment deprivation.

trial, cannot sustain a recovery on that amendment on appeal.[4] Accordingly, the verdict in favor of the plaintiffs is vacated and the case remanded for the entry of a judgment in favor of the defendants.

REVERSED.

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[4]Because of our disposition, we need not address the defendants' other arguments urging reversal.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO: 81-903-CIV-"J" HOEVELER

JAMES DUNSTER, et al.,

*Plaintiff,*

*vs.*

METROPOLITAN DADE COUNTY, et al.,

*Defendants.*

## FINAL JUDGMENT

THIS CAUSE came on for trial before the Court and a jury, beginning December 17, 1984 and concluding on December 21, 1984. The parties presented evidence, made arguments and the jury was instructed and returned its verdict on December 17, 1984. The verdict, consisting of answers to interrogatories submitted to the jury, is attached to this judgment. In conformity with the verdict and findings of the jury, it is ordered that,

JUDGMENT be and its is hereby entered in favor of the plaintiffs and against the defendants, PETER AYDELOTTE and METROPOLITAN DADE COUNTY as follows:

That the plaintiff, the Estate of JAMES DUNSTER, recover of the defendants, PETER AYDELOTTE and METROPOLITAN DADE COUNTY, the sum of ONE HUNDRED SEVENTY FIVE THOUSAND ONE HUNDRED TWENTY FIVE ($175,125.00) DOLLARS, with interest thereon at the rate of 9.08%, as provided by law, and its costs of action.

It is further ORDERED AND ADJUDGED:

That the plaintiff, JEAN DUNSTER, individually, recover of the defendants, PETER AYDELOTTE and METROPOLITAN DADE COUNTY the sum of THIRTY SEVEN THOUSAND FIVE HUNDRED ($37,500.00) DOLLARS with interest thereon at the rate of 9.08%, as provided by law, and her costs of action.

IT IS FURTHER ORDERED AND ADJUDGED:

That the plaintiff, JAMES DUNSTER, SR., individually, recover of the defendants, PETER AYDELOTTE and METROPOLITAN DADE COUNTY, the sum of THIRTY SEVEN THOUSAND FIVE HUNDRED (37,500.00) DOLLARS, with interest thereon at the rate of 9.08%, as provide by law, and his costs of action.

IT IS FURTHER ORDERED AND ADJUDGED:

That the Court reserves jurisdiction on the issue of attorney's fees.

DATED at Miami, Florida, this 8th day of January, 1985.

/s/ Wm. M. Hoeveler
U. S. DISTRICT COURT

Copy furnished to:

Neil Chonin, Esq.
Roy Wood, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO: 81-903-CIV-"J" HOEVELER

JAMES DUNSTER, et al.,

*Plaintiff,*

*vs.*

METROPOLITAN DADE COUNTY, et al.,

*Defendants.*

**VERDICT**

WE, THE JURY return the following verdict:

1. Do you find from the preponderance of the evidence that the defendant, PETER AYDELOTTE, was negligent under the circumstances presented by the evidence?

Yes ✓ No _____

If your answer to question #1 is NO, do not answer question #2. Proceed to question #3. If your answer to question #1 is YES, proceed to question #2.

2. Do you find from the preponderance of the evidence that the negligence of the defendant, PETER AYDELOTTE, was a proximate cause of the death of JAMES DUNSTER?

Yes ✓ No _____

3. Do you find from the preponderance of the evidence that the policy of the METROPOLITAN DADE COUNTY POLICE DEPARTMENT relating to off-duty police officers carrying weapons at all times while off duty falls below acceptable standards of police procedure?

Yes ✓ No _____

If the answer to question #3 is NO, do not answer question #4. Proceed to question #5. If the answer to question #3 is YES, proceed to question #4.

4. Was the policy of the METROPOLITAN DADE COUNTY POLICE DEPARTMENT which required off-duty police officers to carry their weapons at all times, a proximate cause of the death of JAMES DUNSTER?

Yes _____ No ✓

5. Do you find from the preponderance of the evidence that the METROPOLITAN DADE COUNTY POLICE DEPARTMENT policy, or lack of policy, allowing officers complete discretion in cocking and firing their firearms single action, fall below acceptable standards of police procedure?

Yes ✓ No _____

If you answer to question #5 is NO, do not answer question #6 but proceed to question #7. If your answer to question #5 is YES proceed to question #6.

6. Do you find from the preponderance of the evidence that the METROPOLITAN DADE COUNTY

POLICE DEPARTMENT policy or lack of policy allowing officers complete discretion in cocking and firing their firearms single action a proximate cause of the death of JAMES DUNSTER?

Yes ✓ No ____

7. Do you find from the preponderance of the evidence that the decedent, JAMES DUNSTER was negligent under the circumstances presented by the evidence?

Yes ✓ No ____

If the answer to question #7 is YES, proceed to question #8. If the answer to question #7 is NO, do not answer question #8 and proceed to question #9.

8. What percentage of negligence, from the preponderance of the evidence, do you attribute to the decedent, JAMES DUNSTER?

JAMES DUNSTER 25 %

If your answer to questions 2, and 4 and 6 are NO, do not answer any more questions. Just date and sign the Verdict Form and return it to the Court. If your answer to 2, 4, or 6 is YES, proceed to question #9.

9. What are the damages sustained by the decedent, JAMES DUNSTER, JR., for:

Funeral and medical expenses: $ 1,500.00

Past pain and suffering: $ 7,000

Total future and lost earnings reduced to present value: $ 225,000

10. What is ithe total amount of damages sustained by JAMES DUNSTER, SR., the father, for his pain and suffering due to the loss of the parent-child relationship?

$ 50,000

11. What is the total amount of damage sustained by JEAN DUNSTER, the mother, for her pain and suffering due to the loss of the parent-child relationship?

$ 50,000

SO SAY WE ALL.

Dated this 21 day of December, 1984.

/s/ [Illegible]
FOREPERSON

87-457

Supreme Court, U.S.
FILED
OCT 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.

in the

# Supreme Court

of the

# United States

OCTOBER TERM, 1986

JAMES DUNSTER and JEAN DUNSTER, individually and as personal representative of the Estate of James Dunster, Jr.,

*Petitioners,*

*vs.*

METROPOLITAN DADE COUNTY and PETER AYDELOTTE,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals for the Eleventh Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

ROBERT A. GINSBURG
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(305) 375-5151

*By*
John E. Finney
*Assistant County Attorney*
*Counsel of Record*
and
Roy Wood
*Assistant County Attorney*

## QUESTIONS PRESENTED FOR REVIEW

Respondents respectfully restate the questions presented for review as follows:

1. Where a person is killed because of the negligent handling of a firearm by a police officer employed by a county and the jury finds that a county policy with respect to the handling of firearms falls below acceptable standards of police procedure and is the proximate cause of the death, can the county be liable under 42 U.S.C. §1983?

2. Did the court of appeals make the correct disposition of the cause by remanding with instructions to enter judgment for respondents?

3. Did the court of appeals correctly decline to consider whether the deceased suffered a Fourth Amendment violation on the ground that plaintiffs abandoned their Fourth Amendment claims at trial?

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CASE NO.

# in the Supreme Court of the United States

OCTOBER TERM, 1986

JAMES DUNSTER and JEAN DUNSTER, individually and as personal representative of the Estate of James Dunster, Jr.,

*Petitioners,*

*vs.*

METROPOLITAN DADE COUNTY and PETER AYDELOTTE,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals for the Eleventh Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

## OPINIONS BELOW

Respondents accept petitioners' Statement of the Opinions Below.

## JURISDICTION

Respondents accept petitioners' Statement of Jurisdiction.

## STATUTE INVOLVED

Respondents accept petitioners' Statement of the Statute Involved.

## STATEMENT OF THE CASE

Respondents do not accept petitioners' Statement of the Case. Respondents incorporate and adopt as their Statement of the Case the recitation of the facts and proceedings below as set forth in the opinion of the circuit court of appeals reported at 791 F.2d 1516 and reprinted in the appendix to the petition for writ of certiorari.

## REASONS WHY THE PETITION SHOULD BE DENIED

### I.

### THE COURT OF APPEALS CORRECTLY VACATED THE JUDGMENT AGAINST THE COUNTY

Petitioners assert that the decision of the court of appeals on this point conflicts with *Kibbe v. City of Springfield*, 777 F.2d 801 (1st Cir. 1985) and states that the following instruction was given to the jury which resulted in a verdict for plaintiff affirmed on appeal (777 F.2d at 809-810): "A government body can be found responsible for the *deprivation of a person's civil rights* if the actions taken by its employees are in accordance with a custom or practice of the government and those actions caused the deprivation of the person's rights" (Emphasis supplied). Petitioners apparently mean to imply that this is the holding of the case.

Even if the quoted instruction did constitute the holding of the case (which respondents assert it did not), it simply begs the question of what constitutes a "deprivation of a person's civil rights." The holdings of this Court in *Daniels v. Williams*, ____ U.S. ____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) and *Davidson v. Cannon*, ____ U.S. ____, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986) make it clear that mere negligence could not constitute a "deprivation" in the constitutional sense. The verdict and the judgment entered thereon in the instant case make it clear that the jury was only asked to determine whether the conduct of the respondent

police officer amounted to simple negligence and that was all that the jury did determine. Nowhere do petitioners assert that they objected in the district court or the court of appeals to the form of the special interrogatories submitted to the jury. These enabled the jury to find the deceased 25% negligent and caused the district court to reduce the damage award by 25% in accordance with the rule of comparative negligence. Inasmuch as the injury or loss in the instant case was caused by negligence, such injury or loss did not amount to a deprivation in the constitutional sense, and the county therefore cannot be found responsible for a deprivation which did not occur.

It is astounding that petitioners would rely on *Kibbe*. In point of fact, the court of appeals there held that the verdict and judgment in favor of plaintiff should be affirmed because the instructions to the jury sufficiently informed the jury that in order to find the city liable, "it must find a failure to train which amounted to gross negligence." 777 F.2d at 810. This Court granted certiorari and then dismissed the writ as improvidently granted. Four justices dissented from the dismissal of the writ and concurred in an opinion expressing the view that even gross negligence was not a sufficient basis for municipal liability for police training, rather the requisite standard of fault should be deliberate indifference or reckless disregard of the consequences. *City of Springfield v. Kibbe*, ____ U.S. ____, 107 S.Ct. 1114, 1121 (1987). The lower court cases there cited establish that the minimum degree of fault necessary to establish municipal liability for police training policies is, at least, gross negligence. Indeed, the court of appeals decision in *Kibbe*, relied upon by petitioners, stands for this proposition.

Inasmuch as the petitioners made no attempt to establish by the verdict more than simple negligence in the formulation of county policy, the court of appeals correctly determined that the county was entitled to a judgment notwithstanding the verdict.

## II

## THE COURT OF APPEALS MADE THE CORRECT DISPOSITION OF THE CASE BY REMANDING WITH INSTRUCTIONS TO ENTER JUDGMENT FOR RESPONDENTS

Petitioners cite three decisions of other courts of appeals and assert that they conflict with the decision of the court of appeals below. These decisions are *Liss v. School District of City of Ladue,* 548 F.2d 751 (8th Cir. 1977); *Uzzell v. Friday,* 625 F.2d 1117 (4th Cir. 1980); and *Women's Health Services, Inc. v. Maher,* 636 F.2d 23 (2d Cir. 1980). Petitioners argue that these decisions stand for the proposition that where there is an intervening change of law during the pendency of an appeal which requires reversal of the judgment under review, the correct disposition is to remand the cause for a new trial. Conflict is claimed on the ground that the decision below remanded with instructions to enter judgment for appellants.

In the *Liss* case, the court of appeals remanded for further proceedings in large part because of certain specific findings by the district court which were consistent with a conclusion that defendant was liable even under the new standards promulgated in the

intervening decision which represented a change in the law. The district court had originally found against the defendant after a non-jury trial. *Uzzell* was simply a reversal of a summary judgment upon a conclusion that material issues remained for determination. In *Maher*, the district court entered a preliminary and final injunction against enforcement of a state regulation implemented by a federally funded program. The federal agency was a third party defendant and the state was the defendant. Intervening decisions required reversal. The third part defendant urged remand for further proceedings because of remaining unresolved issues pertaining to the third party complaint. The plaintiff and the defendant objected. The court proceeded as urged by the third party defendant, giving two reasons therefor. First, the defendant state would not be prejudiced since the preliminary, as well as the final injunction, would be vacated leaving the state free to enforce the regulation pendente-lite. Second, the court of appeals observed that the state legislature could enact modifications which would resolve or render moot most of the issues.

The decision below was a review of a denial of a motion for judgment notwithstanding verdict; whereas, none of the above three cases relied upon for conflict were jury trials. That fact alone is a sufficient basis to distinguish this case from those cases and show a lack of true conflict. It is well established that the court of appeals has power to order judgment for defendant where it sets aside a verdict for plaintiff and reverses the trial court's failure to grant a judgment notwithstanding verdict, especially where a dispositive issue of law is resolved in defendant's favor on appeal.

*Neely v. Eby Construction Co.*, 386 U.S. 317, 326-7, 18 L.Ed.2d 75, 83, 875 S.Ct. 1072 (1967).

In the instant case, a dispositive issue of law was resolved in defendants' favor. Moreover, respondents contend that the dispositive issue would have been resolved in defendants' favor under the law as it existed prior to the intervening decisions of *Daniels v. Williams*, ____ U.S. ____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) and *Davidson v. Cannon*, ____ U.S. ____, 160 S.Ct. 668, 88 L.Ed.2d 677 (1986).

*Parratt v. Taylor*, 451 U.S. 527 (1981) did not hold that recovery could be had under 42 U.S.C. §1983 for ordinary negligence under all circumstances, but only that negligence did not necessarily foreclose liability thereunder. Quoting *Baker v. McCollan*, 443 U.S. 137, 139-40, 61 L.Ed.2d 433, 439, 99 S.Ct. 2689, 2692, the Court recognized that the question might not be susceptible of a uniform answer in all conceivable cases. Thus, it has always been clear that the Fourteenth Amendment does not protect against all physical injury but only against those which are so brutal, demeaning and shocking as to shock the conscience of a court. See, e.g., *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981); *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980); *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973). In *Hall*, the court noted that in police cases and in school punishment cases the test was whether the force was caused by malice or sadism rather than "merely careless or unwise excess of zeal". (621 F.2d at 613). In *Shillingford*, the Fifth Circuit distinguished actions which might be permissible in dealing with a life-threatening situation but which would be judged

differently when taken against a peaceful pedestrian. (634 F.2d at 265). In *Williams v. Kelley,* 624 F.2d 695 (5th Cir. 1980), a prisoner was killed by guards through use of a choke hold. The court of appeals concluded that the conduct of the guards was not sufficiently egregious so as to be "constitutionally tortious", even though the guards may have been negligent. Decisions of the Fifth Circuit decided prior to October 1, 1981, are binding precedent in the Eleventh Circuit. *Bonnner v. City of Pritchard,* 651 F.2d 1107, 1120 (11th Cir. 1981).

In *Mills v. Smith,* 656 F.2d 337 (8th Cir. 1981), a police officer struggled with the plaintiff while the officer held a cocked weapon which discharged and injured the plaintiff. The court discussed *Parratt v. Taylor,* (656 F.2d at 340, n. 2) and held that plaintiff's constitutional rights had not been violated.

Accordingly, we submit that *Daniels v. Williams, supra,* and *Davidson v. Cannon, supra,* clarified the law but did not radically change it. Under those circumstances there is no need to give plaintiffs a second chance to prove their case, since it was insufficient under pre-existing law.

## III

## THE COURT OF APPEALS CORRECTLY REFUSED TO CONSIDER WHETHER THE DECEASED SUFFERED A FOURTH AMENDMENT VIOLATION ON THE GROUND THAT PLAINTIFFS ABANDONED THEIR FOURTH AMENDMENT CLAIMS AT TRIAL

In *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 677 (1985), a police officer intentionally shot a suspect fleeing the scene of a burglary. This Court held

that the shooting constituted a seizure and that it was unreasonable, reasoning that it was necessary to balance the quality of the intrusion against the importance of the governmental interest alleged to justify the intrusion. The Court set forth a standard defining the reasonable use of deadly force to be where a police officer,

> ". . . has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."
>
> 105 S.Ct. 1701.

The summary of the record in this regard by the court of appeals was entirely accurate. The plaintiffs simply made no effort in the trial court to cause any of the issues involved in a Fourth Amendment claim, as revealed by the above quoted portion of the *Tennessee v. Garner* opinion, to be raised or determined. No jury instructions on any such issues were given. The inclusion of the words "Fourth Amendment" in the pleadings and the pretrial stipulation does not preclude the conclusion that Fourth Amendment issues were not presented at trial. Nor is this conclusion in any way altered by the petitioners' unsupported allegation, made

for the first time in this Court, that some unexplained off-the-record conversation may contain some mention of the Fourth Amendment. 16 C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure* §3956 (1987 Supp., relied upon by petitioners notes the decision of *Mandel v. Max-France, Inc.*, 704 F.2d 1205 (11th Cir. 1983) which states that the appellee has some responsibility for the completeness of the record on appeal, such as where appellee attempts to assert harmless error.

The special interrogatories submitted to the jury and the jury's answers thereto are completely inconsistent with the test for Fourth Amendment liability as quoted above. It is highly significant that the jury found that the county's policy requiring police to carry firearms at all times, including off-duty drinking in bars, was not a proximate cause of the death. According to the jury, in other words, the officer did not shoot the deceased because the officer was drunk. The jury instead determined that the county's policy allowing police officers discretion in determining when to cock their weapons was the proximate cause of the death. The only reason the cocking of a firearm is dangerous is because it increases the risk of an unintentional discharge. Furthermore, the jury's specific finding identifying the policy which caused the death, along with the finding of comparative negligence, necessarily indicates that the jury believed the officer's account of the incident. He was the only witness to testify that the weapon was cocked. The effect of the jury finding, accordingly, was to classify the shooting as unintentional.

Even if the court of appeals had reached the Fourth Amendment claim, it would have been required to resolve it against petitioners. The Fourth Amendment cannot be implicated by a negligent unintentional shooting. Were that the case, by the same logic, a slip and fall caused by custodial negligence in a building maintained by local government would constitute a Fourth Amendment violation. If the facts of this case, as found by the jury were held to constitute a Fourth Amendment claim, *Daniels v. Williams,* ____ U.S. ____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) and *Davidson v. Cannon,* ____ U.S. ____, 160 S.Ct. 668, 88 L.Ed.2d 677 (1986) would be overruled.

If the procedural and substantive protections of the Due Process Clause of the Fourteenth Amendment are not triggered by lack of due care of prison guards, as this Court stated in *Davidson,* 106 S.Ct. at 671, the protections of the Fourth Amendment are not triggered by lack of due care of a municipal or county police officer. As noted by Mr. Justice Douglas, speaking for the Court in *Monroe v. Pape,* 365 U.S. 167, 171, 5 L.Ed.2d 492, 496-7, 81 S.Ct. 473 (1961): ". . . [T]he guarantee against unreasonable searches and seizures contained in the Fourth Amendment has been made applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment." In other words, when applied to state officials, the protections of the Fourth Amendment are themselves protections of the Fourteenth Amendment and are not triggered by mere lack of due care. An "unreasonable" seizure is not committed by an unintentional, negligent act. An "unreasonable" seizure is committed by an intentional seizure done without a sufficient or proper reason.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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